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No. 360

In the Supreme Court of the United States

OCTOBER TERM, 1961

ARNOLD NAMROW AND LILLIAN NAMROW, PETITIONERS

v.

COMMISSIONER OF INTERNAL REVENUE

JAY C. MAXWELL AND DOROTHY N. MAXWELL, PETITIONERS

v.

COMMISSIONER OF INTERNAL REVENUE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

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(II)

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OPINIONS BELOW

The finding of fact, opinion, and dissenting opinion of the Tax Court (R. 159–189) are reported at 33 T.C. 419. The opinion of the Court of Appeals (Pet. 1a–10a) is reported at 288 F. 2d 648.

JURISDICTION

The judgment of the Court of Appeals (Pet. App. 11a) was entered March 27, 1961. A motion for re-

hearing was denied May 31, 1961. (Pet. 11a.) The petition for a writ of certiorari was filed on August 25, 1961. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether the court below erred in holding that certain expenses incurred and paid during the taxable years by the taxpayer-husbands, both practicing psychiatrists, in connection with their enrollment at The Washington Psychoanalytic Institute did not constitute deductible business expenses under Section 162(a) of the Internal Revenue Code of 1954.[1]

STATUTE AND REGULATIONS INVOLVED

Sections 161, 162(a) and 262 of the Internal Revenue Code of 1954, and Section 1.162–5 of Treasury Regulations on Income Tax (1954 Code), are printed in the Appendix, *infra*, pp. 14–19.

STATEMENT

The facts as found by the Tax Court (R. 160–169) may be summarized as follows:

Both taxpayer-husbands (hereinafter called the taxpayers[2]) were engaged in the practice of psychiatry in

[1] The petition (p. 3) states, as an alternative question, whether fees paid by the taxpayers for their own personal psychoanalysis were allowable as *medical* expense deductions, but this subject is not mentioned elsewhere in the petition. These personal psychoanalyses were a part of the curriculum at the institute.

[2] The expenses in issue are those of the husbands, the wives being parties to the proceeding only because of the filing of joint returns.

Washington, D.C., during the taxable years (1954 as to taxpayer Namrow; 1954 and 1955 as to taxpayer Maxwell). During those years they were both also enrolled at The Washington Psychoanalytic Institute, and it is by reason of their enrollment at that institution that the expenses in issue were incurred and paid. (R. 161, 167, 168–169.)

Psychiatry is a recognized medical specialty. A doctor who has achieved the minimum qualifications may properly practice psychiatry without any further training. These minimum requirements are graduation from a recognized medical school, one year of general internship, and one year of specialized residence in an approved institution treating mental disorders. Both taxpayers had completed these requirements prior to the taxable years and, as already stated, were practicing psychiatry. (R. 161, 166–168.)

The Washington Psychoanalytic Institute, where both taxpayers were also enrolled (R. 167, 168), is, according to its yearly bulletin, a school for "the training of psychiatrists in the theory and practice of psychoanalysis" (R. 161). This school, like the Chicago Psychoanalytic Institute at which taxpayer Maxwell trained before transferring to Washington, is one of fourteen institutions organized in accordance with the regulations and standards of the American Psychoanalytical Association. (R. 161–162, 167–168.) The requirements for practicing psychiatry—graduation from an approved medical school, one year general internship, and one year's work in an approved psychiatric hospital—are a requisite to acceptance at the Institute "as a first year student" and the appli-

cant must pledge himself neither to conduct psychoanalytical treatment nor to represent himself as a psychoanalyst until he has been authorized to do so by the faculty of the Institute. (R. 162–163.) According to the school's bulletin, the Institute "offers a complete program of training in psychoanalysis" and the "Successful completion of the training program leads to recommendation for local membership in The Washington Psychoanalytic Society", a constituent organization of the American Psychoanalytic Association. (R. 163.) The Institute has a faculty composed of nineteen doctors listed in the bulletin as "Supervising and Training Analysts" and seven doctors listed as "Teaching Analysts". (R. 161.) The Institute's bulletin provides for "Formal Registration" during the first two weeks of September, with "Lecture and Seminar Instruction" to begin September 28; for holidays such as Thanksgiving and Christmas; for a second semester beginning January 15, and for a registration fee of $30 "Upon enrollment as a first year student". (R. 162–163.) The bulletin also sets forth "The Required Curriculum" for each year for three years, stating that it "conforms to the Standards of The American Psychoanalytical Association for the training of physicians in psychoanalysis". (R. 165.) The listed curriculum gives the name of each course, its number, a short description of it, the name of the faculty member who will conduct the course, the number of sessions and hours each course will be taught, and the charge that will be made for each course. (R. 165–166.) Provision is made for "Transfers of Credit", the bulletin stating that "Transfers of credit

for theoretical instruction shall be accepted from Approved Psychoanalytic Institutes". (R. 166.) The bulletin also describes the three general divisions of the Institute's training program: (1) a preparatory analysis of the student himself, which may require several years and is designed to free the student from personality factors that would interfere with his ability to conduct psychoanalytic treatment; (2) theoretical instruction, consisting "of a graduated series of lectures and seminars covering the theory and technique of psychoanalysis"; and (3) supervised clinical work, consisting of supervised analysis of patients. (R. 163–165.)

Since the students of the Institute are doctors who have graduated from medical schools and completed the minimum requirements for the practice of psychiatry, the students can and do engage in private practice while taking training at the Institute. While the bulletin divides the courses into three yearly periods, it is stated therein that "the student is required to maintain attendance on continuous case seminars and clinical conferences until his supervised work is complete and until the maturity of his analytic ability has been demonstrated". Actually, the minimum time required to complete the training in the Institute is five years. (R. 166.)

In 1954 taxpayer Namrow commenced his personal analysis, the first division of the training program at the Institute (which he did not complete until 1957). During that year he paid one of the faculty members of the Institute $2,250 for her services in that connection. In 1954 he also paid another faculty member

$375 for his services as a supervising analyst. Both of these payments were made in connection with Namrow's training at the Institute. (R. 167.)

Taxpayer Maxwell had completed his personal analysis at the Chicago Psychoanalytic Institute before transferring to The Washington Psychoanalytic Institute, but in 1954 he made a $280 payment to a faculty member of the Chicago Institute in connection with that personal analysis. With respect to his training at The Washington Psychoanalytic Institute, he made payments in 1954 and 1955 for seminars and lectures (in the total amount of $880) and to three faculty members for their services as supervising analysts (in the total amount of $1,890). (R. 168.)

Both taxpayers expected to finish their training at the Institute in 1960, at which time they would become eligible for membership in The Washington Psychoanalytic Society and the American Psychoanalytic Association. (R. 168.)

In their tax returns the taxpayers claimed deductions for the above-mentioned expenses for training at the Institute. (R. 168–169.) The Commissioner denied the deductions (R. 169) and the Tax Court, with five judges dissenting, upheld the Commissioner's action (R. 169–189). The Court of Appeals affirmed. (Pet. App. 1a–10a.)

ARGUMENT

The decision below is correct. There is no conflict of decisions or other occasion for further review. The ultimate inquiry is simply as to the correctness of a factual conclusion in which both courts below concurred.

1. Taxpayers refer to the decision below as clearly erroneous, harsh, short-sighted, unfair, unjust and discriminatory (Pet. 8, 11, 12) but they make no attempt to support their characterizations of the decision. Nor are the characterizations justified.

There is no dispute regarding the law to be applied to the case. Taxpayers are claiming deductions, for income tax purposes, under Section 162(a) of the Internal Revenue Code of 1954 (Appendix, *infra*, p. 14), which allows deductions for all "the ordinary and necessary expenses paid or incurred during the taxable year in carrying on any trade or business * * *." It is for amounts paid for education in psychoanalysis that taxpayers claim such business expense deductions. The applicable Treasury Regulations on Income Tax (1954 Code), Section 1.162–5 (Appendix, *infra*, pp. 14–19), expressly relating to expenses for education, provide that such expenditures are deductible if they are made primarily for the purpose of "Maintaining or improving skills required by the taxpayer in his employment or other trade or business, * * *" and, in contrast, that expenditures for education are not deductible if they are made primarily for the purpose "of obtaining a new position or substantial advancement in position" or if the education is required of the taxpayer "in order to meet the minimum requirements for qualification or establishment in his intended trade or business or specialty therein * * *." As the court below noted (Pet. App. 7a), the rules thus laid down are in accord with the court decisions on the subject.

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Taxpayers have not contended otherwise; nor have they questioned the validity of the regulation.[3] (Pet. App. 7a.)

The only inquiry, therefore, is whether the expenditures in issue—for training in psychoanalysis at The Washington Psychoanalytic Institute—were made for the primary purpose, as taxpayers have contended, of "Maintaining or improving skills required by" them in their practice of psychiatry. Both courts below held that they were not. Their conclusion, a factual one, is plainly correct.

Factually, the issue revolves primarily around the place of psychoanalysis in the business of practicing psychiatry. It is undisputed that psychiatrists employ various treatment techniques, including psychotherapy or what is sometimes called the "talking cure". (R. 173.) It is also undisputed that psychoanalysis is a particular variety of psychotherapy which was devised and developed by Freud and is the most intensified form of the "talking cure". (R. 174.) That it is a skill not possessed by ordinary psychiatrists, and instead is a skill needed to qualify a psychiatrist to engage in a certain type of psychiatric practice, as both courts below concluded (R. 176, 177; Pet. App. 8a, 9a-10a), is evident from other undisputed facts.

Training in psychoanalysis is not a prerequisite to the practice of psychiatry, the minimum requirements to the latter being simply graduation from a recog-

[3] The nondeductible expenditures described in the Regulations are considered to fall into the category of personal expenses, for which the Code, in Section 262 (Appendix, *infra*, p. 14), expressly precludes a deduction.

nized medical school, one year of general internship, and one year of specialized residency in an approved institution treating mental disorders. (R. 161.) Psychiatrists do not ordinarily call themselves psychoanalysts unless they have had training in psychoanalysis. (R. 174–175.) The need for a course of training before a psychiatrist is considered qualified to engage in psychoanalysis is reflected in the fact that specialized institutions for "the training of psychiatrists in the theory and practice of psychoanalysis" have been set up in 11 cities in the United States and organized in accordance with regulations and standards of the American Psychoanalytic Association. (R. 161–163.) The very first part of this course of training consists of a personal analysis of the psychiatrist himself, which may require several years, designed to free him from personality factors that would interfere with his ability to conduct psychoanalytic treatment. (R. 163–164.) Among other things, the student-psychiatrist must pledge himself in writing neither to conduct psychoanalytical treatment nor to represent himself as a psychoanalyst until he has been authorized to do so by the faculty of the institute. As the court below stated (Pet. App. 3a), the description of the operations of these institutes (R. 161–166) amply demonstrates the special training which, in the opinion of the medical profession in general and of its psychiatric branch in particular, is needed to qualify a psychiatrist to practice psychoanalysis. That this special training is the standard accepted in practice is also evidenced by the taxpayers' own action in making substantial expend-

itures of money and devoting long periods of time in intensive training, while practicing psychiatry, in order to secure the recognition of their professional brethren as competent to engage in the practice of psychoanalysis. In brief, in the language of the Tax Court (R. 177), psychoanalysis "is certainly a recognized specialty in the sense that it is a special technique that requires affiliation with Institutes before there is any recognition amongst doctors that one is qualified to practice it."

It follows that the expenditures each taxpayer made during the taxable years for training in psychoanalysis at The Washington Psychoanalytic Institute were not made for the purpose for which the applicable Treasury Regulations allow a deduction, i.e., "Maintaining or improving skills required by the taxpayer in his employment or other trade or business." Taxpayers have argued that the Institute training merely improves upon the skill which every psychiatrist possesses (see Pet. App. 8a–9a), but the facts refute that argument; psychoanalysis, the skill involved, is something special over and above the skill, possessed by the ordinary psychiatrist, of using the "talking cure." Before training at a psychoanalytic institute, neither taxpayer had psychoanalytic skill in the sense in which that skill is viewed in the medical profession. Indeed, the skill was not even a requirement in his business of practicing psychiatry. Taxpayers' expenditures for training at The Washington Psychoanalytic Institute were therefore made for the purpose of acquiring a skill, rather than of maintaining or improving a skill already possessed and required

by them in their business. The expenditures were necessarily made for one of the nondeductible purposes stated in the applicable Treasury Regulations, i.e., to obtain a new position, substantial advancement in position, or in order to meet the minimum requirements for qualification in a specialty in the practice of psychiatry.

2. Taxpayers are in error in asserting (Pet. 14–16) that the decision below is in conflict in principle with *Marlor* v. *Commissioner*, 251 F. 2d 615 (C.A. 2d), and *Devereaux* v. *Commissioner* (C.A. 3d), decided June 19, 1961 (7 A.F.T.R. 2d 1645). The principle involved in those cases does not support allowance of the deductions claimed here.

In *Marlor* expenses were incurred by the taxpayer in working toward a doctorate degree for the dual objective of qualifying for appointment to the permanent staff of a college and of retaining a temporary position as a tutor. The Second Circuit, by reference to the dissenting opinion in the Tax Court (27 T.C. 624), held that the expenses were deductible on the ground that the taxpayer's more immediate objective was to retain his temporary position as a tutor, which was necessary in order to earn the very income which the Commissioner sought to tax. The rationale of that decision, emphasizing the taxpayer's *primary* purpose, was later incorporated into the Treasury Regulations which are applicable to the present case. Those Regulations were applied in *Devereaux*, a case similar to *Marlor*, where the taxpayer held the position of an assistant professor and the expenses he incurred in working toward a doctorate were for the dual purpose

of retaining that position and of qualifying himself for promotion and salary increases. The court allowed a deduction for the expenses, holding that the second purpose was incidental to the first.

In support of their allegation that the decision below is in conflict in principle with *Marlor* and *Deveraux*, taxpayers state that in the present case one of the objectives and consequences of training at The Washington Psychoanalytic Institute is that the psychiatrist is enabled to maintain and enlarge his practice by receiving referral patients from other psychiatrists. In other words, taxpayers claim that their expenses of training at the Institute were expenses of obtaining business. But they have never even claimed that this was the *primary* purpose of their expenditures. Nor could they have properly done so. Any such purpose was necessarily incidental to their purpose to acquire psychoanalytic skill, since, without that skill, they would receive no referral patients.

3. Taxpayers assert that the case presents "novel questions" which should be settled by this Court, stressing the fact that the decision below will have an impact on the tax liabilities of numerous psychiatrists all over the country who are taking psychoanalytic training. (Pet. 8–11.) However, the question presented is a "novel" one only in the sense that it involves a particular factual subject matter. It is a test case, according to taxpayers (Pet. 10), to determine into which category—deductible or nondeductible—the expenses of psychiatrists for psychoanalytic training fall under the applicable Treasury Regulations. The case, as argued in the courts below, presents only

a factual question. The facts have been fully developed and both courts below have concurred in the conclusion that, on the evidence, the expenses do not fall into the category of deductible expenses, i.e., expenses incurred primarily for the purpose of "Maintaining or improving skills required by the taxpayer in his employment or other trade or business." That factual conclusion must stand unless it is "clearly erroneous." *Commissioner* v. *Duberstein*, 363 U.S. 278, 291. While taxpayers assert that the court below "misapplied" *Duberstein* (Pet. 16–17), the assertion is, we believe, wholly unjustified. The "novel" question presented by the case is one which has already received ample review and has been answered correctly.

CONCLUSION

For the reasons stated above, the petition for a writ of certiorari should be denied.

Respectfully submitted.

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APPENDIX

Internal Revenue Code of 1954 (26 U.S.C.):

SEC. 161. ALLOWANCE OF DEDUCTIONS.

In computing taxable income under section 63(a), there shall be allowed as deductions the items specified in this part, subject to the exceptions provided in part IX (sec. 261 and following, relating to items not deductible).

SEC. 162. TRADE OR BUSINESS EXPENSES.

(a) *In General.*—There shall be allowed as a deduction all the ordinary and necessary expenses paid or incurred during the taxable year in carrying on any trade or business, including—

* * * * *

SEC. 262. PERSONAL, LIVING, AND FAMILY EXPENSES.

Except as otherwise expressly provided in this chapter, no deduction shall be allowed for personal, living, or family expenses.

Treasury Regulations on Income Tax (1954 Code):

Sec. 1.162–5 *Expenses for Education.*—(a) Expenditures made by a taxpayer for his education are deductible if they are for education (including research activities) undertaken primarily for the purpose of:

(1) Maintaining or improving skills required by the taxpayer in his employment or other trade or business, or

(2) Meeting the express requirements of a taxpayer's employer, or the requirements of applicable law or regulations, imposed as a condition to the retention by the taxpayer of his salary, status or employment.

Whether or not education is of the type referred to in subparagraph (1) of this paragraph shall be determined upon the basis of all the facts of each case. If it is customary for other established members of the taxpayer's trade or business to undertake such education, the taxpayer will ordinarily be considered to have undertaken this education for the purpose described in subparagraph (1) of this paragraph. Expenditures for education of the type described in subparagraph (2) of this paragraph are deductible under subparagraph (2) only to the extent that they are for the minimum education required by the taxpayer's employer, or by applicable law or regulations, as a condition to the retention of the taxpayer's salary, status, or employment. Expenditures for education other than those so required may be deductible under subparagraph (1) of this paragraph if the education meets the qualifications of subparagraph (1). A taxpayer is considered to have made expenditures for education to meet the express requirements of his employer only if the requirement is imposed primarily for a bona fide business purpose of the taxpayer's employer and not primarily for the taxpayer's benefit. Except as provided in the last sentence of paragraph (b) of this section, in the case of teachers, a written statement from an authorized official or school officer to the effect that the education was required as a condition to the retention of the taxpayer's salary, status, or employment will be accepted for the purpose of meeting the requirements of this paragraph.

(b) Expenditures made by a taxpayer for his education are not deductible if they are for education undertaken primarily for the purpose of obtaining a new position or substantial advancement in position, or primarily for the purpose of fulfilling the general educational aspirations or other personal purposes of the

taxpayer. The fact that the education undertaken meets express requirements for the new position or substantial advancement in position will be an important factor indicating that the education is undertaken primarily for the purpose of obtaining such position or advancement, unless such education is required as a condition to the retention by the taxpayer of his present employment. In any event, if education is required of the taxpayer in order to meet the minimum requirements for qualification or establishment in his intended trade or business or specialty therein, the expense of such education is personal in nature and therefore is not deductible.

(c) In general, a taxpayer's expenditures for travel (including travel while on sabbatical leave) as a form of education shall be considered as primarily personal in nature and therefore not deductible.

(d) If a taxpayer travels away from home primarily to obtain education the expenses of which are deductible under this section, his expenditures for travel, meals, and lodging while away from home are deductible. However, if as an incident of such trip the taxpayer engaged in some personal activity such as sightseeing, social visiting or entertaining, or other recreation, the portion of the expenses attributable to such personal activity constitutes nondeductible personal or living expenses and is not allowable as a deduction. If the taxpayer's travel away from home is primarily personal, the taxpayer's expenditures for travel, meals, and lodging (other than meals and lodging during the time spent in participating in deductible educational pursuits) are not deductible. Whether a particular trip is primarily personal or primarily to obtain education the expenses of which are deductible under this section depends upon all the facts and circumstances of each case. An important factor to

be taken into consideration in making the determination is the relative amount of time devoted to personal activity as compared with the time devoted to educational pursuits. Expenses in the nature of commuters' fare are not deductible.

(c) The provisions of this section may be illustrated by the following examples:

Example (1).—A is employed by an accounting firm. In order to become a certified public accountant he takes courses in accounting. Since the education was undertaken prior to the time A became qualified in his chosen profession as a certified public accountant, A's expenditures for such courses and expenses for any transportation, meals, and lodging while away from home are not deductible.

Example (2).—B, a general practitioner of medicine, takes a course of study in order to become a specialist in pediatrics. C, a general practitioner of medicine, takes a 2-week course reviewing developments in several specialized fields, including pediatrics, for the purpose of carrying on his general practice. B's expenses are not deductible because the course of study qualified him for a specialty within his trade or business. C's expenses for his education and any transportation, meals and lodging while away from home are deductible because they were undertaken primarily to improve skills required by him in his trade or business.

Example (3).—D is required by his employer (or by State law) either to read a list of books or to take certain courses giving six hours academic credit every two years in order to retain his position as a teacher. D fulfills the requirement by taking the courses and thereby receives an automatic increase in salary in his present position and salary schedule. Also, as the result of taking the prescribed courses, at the end of ten years, D receives a master's degree and becomes automatically

eligible for an additional salary increase. Since D's purpose in taking the courses was primarily to fulfill the educational requirement of his employer, his expenses for such education and transportation, meals, and lodging while away from home are deductible.

Example (4).—The facts are the same as in example (3) except that, due solely to a shortage of qualified teachers, D's employer does not enforce the prescribed educational requirements in that other teachers who do not fulfill those requirements are retained in their positions. D's expenses are nevertheless deductible.

Example (5).—E, a high school teacher of physics, in order to improve skills required by him and thus improve his effectiveness as such a teacher, takes summer school courses in nuclear physics and educational methods. E's expenses for such courses are deductible.

Example (6).—F takes summer school courses in order to improve skills required by him in his employment as a teacher. As a result of taking such courses F receives an in-grade increase in salary in his present position pursuant to a salary schedule established by the school system for which he works. F's expenditures for such courses are deductible.

Example (7).—G, a graduate student at a university, plans to become a university professor. In order to qualify as a regular faculty member, G must obtain a graduate degree. While taking the required graduate courses, G is engaged in teaching at the university. G's expenses therefore are not deductible since he has not completed the education required to become qualified as a regular faculty member at the time he takes such courses.

Example (8).—H, a self-employed tax consultant, decides to take a 1-week course in taxation, which is offered in City X, 500 miles away from his home. His primary purpose in going to X is to take the course, but he also takes a

side trip to City Y (50 miles from X) for one day, takes a sightseeing trip while in X, and entertains some personal friends. H's transportation expenses to City X and return to his home are deductible but his transportation expenses to City Y are not deductible. H's expenses for meals and lodging while away from home will be allocated between his educational pursuits and his personal activities. Those expenses which are entirely personal, such as sightseeing and entertaining friends, are not deductible to any extent.

Example (9).—The facts are the same as in example (8) except that H's primary purpose in going to City X is to take a vacation. This purpose is indicated by several factors, one of which is the fact that he spends only one week attending the tax course and devotes five weeks entirely to personal activities. None of H's transportation expenses are deductible and his expenses for meals and lodging while away from home are not deductible to the extent attributable to personal activities. His expenses for meals and lodging allocable to the week attending the tax course, are, however, deductible.

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